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No. 10-349

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

REPLY FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners Shell Oil Company and SWEPI LP (successor-in-interest to Shell Western E & P, Inc.) state that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONERS

The court below upheld a record-breaking $53 million punitive award based on the failure to pay $750,000. Attempting to obscure that staggering 71-to-1 ratio, the court defined the "compensatory" denominator to include $12.5 million in prejudgment interest imposed at a special *12% rate* applicable only to particular oil-and-gas cases. But 12% is *double* the ordinary prejudgment rate; far exceeds any conceivably appropriate benchmark; and was enacted expressly as a "penalty." Respondents characterize the rate as an "ordinary" effort "to compensate victims for the time value of their lost money." Yet they cannot explain why the time-value of money is 12% where the defendant is an oil-and-gas company but 6% for any other defendant. Nor can they explain how 12% com-

pound interest could be purely "compensatory" when inflation averages a third of that and ordinary interest averages about a half.

Respondents urge this Court not to look behind state-law labels. "Lower courts," they insist, "properly * * * confine[ ]" themselves to formal state-law labels and refuse any "federal" analysis that might "displace[ ] state lines between compensatory and punitive damages." Br. in Opp. 7. Some courts, including the court below, follow that approach. But many do the opposite: They decide whether an award is punitive or compensatory for due-process purposes based on its *substance*. Ignoring one side of that important conflict does not make it disappear. And this case starkly demonstrates the consequences of blindly deferring to state-law labels.

The courts are also divided on the presumptive maximum ratio in cases with substantial compensatory awards. In *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605 (2008), this Court recognized that relying solely on *Gore*'s verbal formulae without further numerical guidance made it "*inevitable* that the specific amount of punitive damages awarded by a judge or by a jury will be arbitrary" and suggested that "*[no]thing but a quantified approach will work.*" *Id.* at 2628, 2629 (emphasis added). *Amici curiae* Chamber of Commerce *et al.* (at 10-14), International Association of Defense Counsel and National Association of Manufacturers (at 3-6), Product Liability Advisory Council (at 5-12), and the American Petroleum Institute (at 8-15) demonstrate the devastating impact of the "widely divergent" approaches and the critical need for this Court's intervention. This case presents an ideal vehicle for resolving that conflict as well.

I. State And Federal Courts Are Divided Over How To Calculate The Punitive-To-Compensatory Damages Ratio

The punitive-to-compensatory damages ratio is the most commonly cited indicator of an excessive punitive damages award. *BMW* v. *Gore*, 517 U.S. 559, 580 (1996); API Br. 7. Yet courts are divided over how to decide whether a particular recovery goes into the ratio's numerator or denominator. As respondents acknowledge (at 7), many courts treat formal state-law labels as dispositive. But other courts look to the award's *substance* and *function* to decide, as a *federal* constitutional matter, whether an award should be considered "compensatory" because it "'will compensate the injured party for the injury sustained, *and nothing more*,'" *McMillian* v. *FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996) (quoting *Black's Law Dictionary* 270 (6th ed. abridged 1991) (emphasis added)), or "punitive" because it imposes additional costs on the defendant for deterrence, *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007).

A. Respondents concede that the court below accepted Oklahoma's state-law "compensatory" label as dispositive, declining to analyze whether 12% compound interest is in substance compensatory for due-process purposes. Ignoring that omission, respondents attack (at 10-12) the strawman argument that prejudgment interest is *never* "compensation." But the petition does not argue that.[1] And respondents' effort to characterize 12% compound interest as purely "compensatory" is unavailing.

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[1] The petition does explain why prejudgment interest might be excluded from the ratio *even if* it is "compensatory." For example, including prejudgment interest in the ratio perversely punishes stale claims more severely. Pet. 23-24. Moreover, the Constitution permits punitive damages only to punish *the defendant's* misconduct.

Noting that inflation and interest rates were high in one year—1980—respondents assert that 12% compound interest is an "ordinary" effort "to compensate victims for the time value of their lost money." Br. in Opp. 12. But that purported compensatory goal cannot explain why Oklahoma left the statutory rate for all *other* economic damages at 6%, while forcing oil-and-gas defendants to pay twice that amount. Pet. 14. The time-value of money to "compensate" the plaintiff cannot be 6% if the defendant is a banker, optician, or car dealer, but 12% if the defendant is an oil company.

Moreover, 12% compound interest far exceeds any relevant benchmark. Average inflation for the past half-century is less than 4%; no decade in that period has averaged over 7.5%.[2] Even the prime rate (Br. in Opp. 12, 17) has averaged far closer to 6% than to 12%—both during the last half-century and between 1989 and 2008, when Oklahoma imposed 12% compound interest on Shell.[3] Respondents' claim (at 15) that "the dollar that Shell took in 1974 was worth only 22 cents in 2008" proves our point. If respondents are correct—and indulging the erroneous assumption that all $750,708 accrued in 1974—the amount Shell withheld would at most be equivalent to $3.4 million today. A $53 million punitive

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Imposing punitive damages on prejudgment interest punishes the defendant for the interest rate and plaintiff's delay in filing suit—neither of which reflects the defendant's culpability. API Br. 16-17. And it makes no sense to deny prejudgment interest on punitive damages, but award punitive damages on prejudgment interest, since the results are mathematically identical. *Id.* at 23-24. Respondents ignore those arguments.

[2] See InflationData.com, *Average Annual Inflation by Decade*, http://inflationdata.com/inflation/Inflation/DecadeInflation.asp.

[3] See Federal Reserve Release, http://www.federalreserve.gov/releases/h15/data/Annual/H15_PRIME_NA.txt.

damages award on $3.4 million in compensation *still* yields a double-digit 15-to-1 ratio that defies this Court's precedents. The Oklahoma legislature itself understood 12% interest was a "penalty" when enacting it in 1980. See Pet. 7, 15. And respondents cite *no State in the Nation* that uses a 12% baseline for time-value of money.

Respondents contend (at 13) that 12% compound interest is not "punitive" but "an incentive" to "compel compliance." But "compensation" by definition seeks to make the plaintiff whole, not impose additional costs to alter the defendant's conduct. See Pet. 18 (citing *Black's Law Dictionary*); *McClain* v. *Ricks Exploration Co.*, 894 P.2d 422, 431-432 (Okla. Civ. App. 1994) ("12% interest * * * is in the nature of a *penalty to compel compliance*" (emphasis added)). One could just as easily urge that steep fines and incarceration are not "punishment" but mere "incentives" to "compel compliance." Respondents (at 14) attribute such reasoning to the Tenth Circuit in *Okland Oil Co.* v. *Conoco, Inc.*, 144 F.3d 1308, 1320 (1998). But that underscores the need for review: The Sixth Circuit has rejected that approach. *Bridgeport*, 507 F.3d at 489 (deterrent disgorgement remedy—which "prevent[ed] the infringer from unfairly benefiting from a wrongful act"—was "punitive").[4]

Besides, cases like *Okland* and *Purcell* v. *Santa Fe Minerals, Inc.*, 961 P.2d 188 (Okla. 1998), address whe-

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[4] Respondents urge (at 13) that PRSA interest is "completely different" from punitive damages because it is awarded regardless of scienter or culpability. But the PRSA exempts non-payment based on a justifiable title dispute from heightened 12% interest. Pet. 19 n.4. If the 12% rate were compensation for plaintiffs, not punishment for defendants, the claimed justification would be irrelevant. Besides, 100% daily interest imposed solely on one group of defendants would not suddenly become "compensatory" merely because it was imposed without fault.

ther PRSA interest is a "penalty" for purposes of *Oklahoma* law. *Purcell* overturned the Oklahoma Supreme Court's earlier conclusion that 12% interest was a "penalty," *Fleet* v. *Sanguine, Ltd.*, 854 P.2d 892, 899-900 (Okla. 1993), based solely on the Oklahoma legislature's removal of the words "as the penalty" from the statute with no change to the statute's substance. *Purcell*, 961 P.2d at 193; Pet. 15. Unless one accepts respondents' claim that only state-law labels matter, those cases prove nothing.

B. In any event, respondents' assertion that 12% compound interest is genuinely compensatory is irrelevant because the court below never evaluated that issue. Instead, it simply followed Oklahoma's formal state-law label. The correctness of that approach is what divides the courts. Respondents urge (at 7) that "[l]ower courts * * * have confined" themselves to state-law labels, refusing to perform a functional "federal" analysis that might "displace[ ] state lines between compensatory and punitive damages" when calculating the *Gore* ratio. But they ignore the many other cases holding that an award is not automatically "compensatory" merely because the legislature said so. Pet. 17-19; *e.g.*, *Bridgeport*, 507 F.3d at 489. Those cases look to the award's substance and hold that, if it provides more than the plaintiff lost, it encompasses "a punitive element." Pet. 17-19. Many state supreme courts likewise reject state-law labels for constitutional purposes when nominally "compensatory" awards incorporate a "punitive" component. See, *e.g.*, *Roby* v. *McKesson Corp.*, 219 P.3d 749, 768-769 (Cal. 2009); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 308 (Tex. 2006). So does this Court. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 426 (2003)

(putatively compensatory awards sometimes contain a "punitive element").

Respondents make no effort to reconcile that conflict. Their bald assertion (at 10) that the "cases do not set forth any general approach to distinguish between compensatory and punitive damages that would put them at odds with each other" is devoid of supporting analysis. And respondents miss the point in dismissing (at 9) myriad contexts in which the issue arises (treble damages, attorney's fees, capped damages) as "involv[ing] legal questions that are not presented in this case." That the same problem arises in many contexts underscores the issue's *importance*. The division over whether an award's character as "punitive" or "compensatory" should be resolved solely by reference to state law (as respondents contend), or whether instead federal principles play some role (as we contend), cuts across every one of those contexts.

Respondents urge that this Court "should avoid" looking behind formal state-law labels when determining whether an award is compensatory or punitive for due-process purposes, characterizing it as "an anchorless endeavor." Br. in Opp. 7. But respondents would render anchorless the ratio that has been an important part of this Court's due-process analysis. For example, while Oklahoma's and Alabama's oil-and-gas-payment prejudgment interest statutes are "virtually identical," Alabama determined that its 12% interest statute *is* "penal in nature," and rejected Oklahoma's contrary approach. *Ala. Dep't of Conservation & Natural Res.* v. *Exxon Mobil Corp.*, 11 So. 3d 194, 200-201 (Ala. 2008).[5] It cannot be

[5] Just as the label "penalty" was originally in but later removed from Oklahoma's statute, the term "penalty" appeared in the title of the originally enacted Alabama bill but not in re-enacting legislation.

that, because the two States place different labels on otherwise identical statutes, an Oklahoma jury can impose more than $50 million in punitive damages here without violating due process, while an Alabama jury hearing the same facts would flagrantly violate it by awarding even a fraction of that amount. See IADC/NAM Br. 6-7. In other constitutional contexts, courts look to the *substance* of state law, "no matter how the State labels it." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002); see Pet. 20. If the "Constitution is concerned with substance, not labels," Br. in Opp. 13, courts must do so here as well. Respondents' contrary view produces the bizarre result that, the "more punitive the interest rate, the greater additional punishment that can be imposed on top of it as punitive damages." API Br. 22.

Retreating to hyperbole, respondents raise the specter of this Court promulgating the constitutional equivalent of the Consumer Price Index. Br. in Opp. 17. But the reasons for excluding exceptional prejudgment interest (and perhaps all prejudgment interest and other add-ons)—that they are unrelated to the culpability of the conduct being punished, see p. 3 n.1, *supra*—have nothing to do with any particular rate. Moreover, this Court need not second-guess statutorily determined interest rates to prevent States from padding the ratio's denominator with patently punitive sums. It need only disapprove unjustified reliance on arbitrary labels where meaningful analysis shows the award punitive in substance and function. That should provide discipline

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Ala. Dep't of Conservation, 11 So. 3d at 200. Although "Oklahoma courts no longer refer[red] to [PRSA] as a 'penalty' provision" after the word "penalty" was deleted, the Alabama Supreme Court concluded that deleting the word "penalty" did not render 12% interest any less "penal in nature." *Id.* at 201 & n.6.

enough. Respondents' proposal, by contrast, would render *Gore*'s ratio so manipulable as to be useless.[6]

II. The Courts Are Divided On The Presumptive Benchmark For The Punitive-To-Compensatory Damages Ratio

This Court has repeatedly observed that, when compensatory damages are substantial, a 1-to-1 ratio may be "the outermost limit." *State Farm*, 538 U.S. at 425; see *Exxon Shipping*, 128 S. Ct. at 2626, 2634 n.28. Taking that guidance seriously, many courts (like the First, Sixth, and Eighth Circuits) "have used a 1:1 ratio" as the presumptive "benchmark when compensatory damages are substantial." *Jurinko* v. *Med. Protective Co.*, 305 F. App'x 13, 28, 30 (3d Cir. 2008); see Pet. 27-28 (citing *Bridgeport*, 507 F.3d at 488; *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007); *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 53-56 (1st Cir. 2009); and *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004)). By contrast, other courts have adopted 4-to-1 or even 9-to-1 as the presumptive "proxy for the limits" of due process, adjusting upwards from there. Pet. 28 (quoting *Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005)); *id.* at 29-30 & n.8 (citing *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003); and *Seltzer* v. *Morton*, 154 P.3d 561 (Mont. 2007)).

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[6] Although conceding that this issue was fully preserved, respondents suggest (at 16-17) that "evidence" of whether 12% is "compensatory" is insufficiently developed. This Court regularly relies on related statutory provisions and uncontested historical facts like those cited by the petition, invoked by respondents, and relied upon by the parties below. The notion that a trial court should "take evidence" on such incontrovertible matters defies common sense and was never urged below.

Respondents assert (at 20) that those courts all apply the same test—"the three *Gore* guideposts." But respondents cannot deny that those courts have adopted conflicting *presumptions*. Some start with a presumptive 1-to-1 limit and move up from there based on special considerations; others start at 4-to-1, or more, and move up from there. And despite respondents' assertion (at 20) that factual differences justify the dramatically differing outcomes, respondents never identify a single such difference (much less a meaningful one). For example, the petition (at 29) explains that the Sixth Circuit's decision in *Bridgeport* and the Federal Circuit's decision in *Rhone-Poulenc* "squarely conflict on their facts." Respondents offer no response. The fact is that 1-to-1 is now a predictable lodestar in many courts, with departures only for particularly egregious conduct or other special circumstances. See *Bach*, 486 F.3d at 156. Yet other courts start with a presumptive 4-to-1 or 9-to-1 ratio even if the "behavior is not particularly egregious." *Planned Parenthood*, 422 F.3d at 962; see *Rhone-Poulenc*, 345 F.3d at 1372. Those different starting points lead to different multi-million dollar outcomes for otherwise identical conduct. Pet. 31.

Respondents deny (at 20-21) the conflict by invoking three cases in which the First, Sixth, and Eighth Circuits upheld ratios exceeding 1-to-1. But the point is not that courts have adopted 1-to-1 as an *absolute* outer limit. The point is that, while some courts expressly recognize 1-to-1 as the *presumptive* limit—to be exceeded only when compensatory damages are insubstantial or conduct is particularly egregious—others begin with a much higher presumptive limit. Thus, the First, Sixth, and Eighth Circuit cases invoked by respondents (at 21) all involved the sort of lingering death, brutal and inten-

tional physical harm, or less-than-substantial recovery identified as grounds for departing upward from a presumptive 1-to-1 limit.[7] And the fact that respondents' primary answer to extensive inter-circuit conflict is to claim intra-circuit confusion underscores the need for this Court's guidance. Currently, "the outer limits of due process differ greatly depending on the fortuity of where and in what court a case happens to be decided." PLAC Br. 3. The claim that the identity of the panel also matters is little comfort.

Finally, respondents urge (at 18-19 & n.28) that this Court has previously declined opportunities to provide needed clarity. But the conflict has grown in scope and importance, as the many *amicus* briefs (IADC/NAM, Chamber of Commerce, PLAC, API) attest. This Court, moreover, recently observed that "a quantified approach" is necessary to avoid "arbitrary" results in the admiralty context. *Exxon Shipping*, 128 S. Ct. at 2628, 2629. Experience now proves that observation correct for due-process cases as well. The inadequacy of prior vehicles is no basis for allowing conflicting approaches on the presumptive benchmark to persist forever. This case presents the conflict squarely. The time for review is now.

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[7] In *Casillas-Diaz* v. *Palau*, 463 F.3d 77, 80, 85-86 & n.4 (1st Cir. 2006), the defendants "brutally beat[ ]" the plaintiffs and the court upheld only a 2-to-1 ratio on $250,000 in compensatory damages for one plaintiff and, for the plaintiff who recovered a relatively insubstantial $50,000, a 10-to-1 ratio. Similarly, *Gibson* v. *Moskowitz*, 523 F.3d 657, 664-665 (6th Cir. 2008), upheld a 2-to-1 ratio where the "multi-day wrenching facts" showed that the victim died of slow dehydration, losing "40 pounds over four and a half days." And *Quigley* v. *Winter*, 598 F.3d 938, 953-955 (8th Cir. 2010), involved a less-than-substantial monetary award. The defendant's prolonged sexual harassment forced the plaintiff to abandon her residence but caused only $13,685 in damages; the courts still *reduced* punitive damages to 4-to-1.

* * * * *

For the foregoing reasons and those set forth in the petition and *amicus* briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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